No. 93-1033

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID RONALD CHANDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in failing to instruct the jury regarding the non-capital sentencing alternatives to which petitioner would be subject if the jury did not recommend imposition of a sentence of death.

2. Whether the district court was required to inform the jury of the consequences of its failure to reach a unanimous recommendation to impose a sentence of death, even though it advised the jury specifically that a sentence of death could be imposed only upon the unanimous recommendation of the jury.

3. Whether the district court committed plain error when it failed to require the jury to return specific written findings regarding the existence or non-existence of mitigating factors.

4. Whether 21 U.S.C. 848 adequately narrows the class of death-eligible defendants.

5. Whether the indictment and the jury instructions adequately described the required nexus between the murder and petitioner's operation of a continuing criminal enterprise.

6. Whether the district court displayed excessive bias in its comments explaining an adverse ruling on a pretrial motion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A55) is reported at 996 F.2d 1073.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. A petition for rehearing was denied on September 30, 1993. Pet. App. A57-A58. The petition for a writ of certiorari was filed on December 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of a variety of narcotics and money-laundering offenses not directly relevant to the petition, as well as committing murder in furtherance of a criminal enter-

prise, in violation of 21 U.S.C. 848(e). The district court sentenced petitioner to death on the murder charge. The court of appeals affirmed the sentence of death. Pet. App. A1-A55.

1. Between 1988 and 1990, petitioner developed an extensive marijuana growing and distribution operation centered in northeastern Alabama, which involved the cultivation of more than 100 separate plots of land. Petitioner also employed couriers to transport to Alabama processed marijuana that he purchased from suppliers in Texas and Georgia for eventual distribution through his network of distributors. See Pet. App. A3.

One of petitioner's dealers was Donna Shuler, the half-sister of petitioner's wife and Charles Ray Jarrell, Sr., who worked for petitioner as a courier. On March 2, 1990, state law enforcement officers conducted a warrant-authorized search of Donna Shuler's home, which resulted in her arrest and the seizure of about one kilogram of marijuana. When Donna Shuler's attorney reviewed the government's case file, he made a copy of an affidavit attached to the search warrant, which indicated that the information leading to the search of her apartment had come from Marlin Shuler, Donna Shuler's former husband. See Pet. App. A3-A4.

On the morning of May 8, 1990, petitioner went to the residence of Charles Ray Jarrell, Sr. Marlin Shuler was at Jarrell's house when petitioner arrived. Speaking privately to Jarrell, petitioner stated that Marlin Shuler was "going to cause me and you a whole lot of trouble" and suggested that Jarrell "go on and take care of him." Pet. App. A5. Petitioner added that he "still [had] that $500.00" for Jarrell, referring to an earlier conversation between petitioner and Jarrell (before the search of Donna Shuler's apartment), during which petitioner had offered Jarrell $500 if he would kill Marlin Shuler. See *id.* at A3-A5.

After petitioner departed, Jarrell and Marlin Shuler spent the morning drinking heavily. The two men then drove to Snow's Lake, where they engaged in target

practice with two pistols that Jarrell had brought: a .380 caliber pistol that Jarrell owned and a nine millimeter pistol that petitioner had left in Jarrell's car the previous night. Jarrell then shot Shuler twice with the nine millimeter pistol and killed him. Jarrell drove to petitioner's house and told him that he had killed Shuler. Petitioner and Jarrell returned to Snow's Lake, retrieved Shuler's body, and buried it near an abandoned liquor still. See Pet. App. A5.

2. A grand jury in the United States District Court for the Northern District of Alabama returned an indictment charging petitioner with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; distribution of marijuana, in violation of 21 U.S.C. 841; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e); using or carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c); and money laundering, in violation of 18 U.S.C. 1956. Jarrell entered into a plea agreement, pursuant to which he pleaded guilty to the conspiracy charge and testified for the government at petitioner's trial. The jury found petitioner guilty on all counts. See Pet. App. A2, A6.

The district court then conducted a penalty hearing, at which the government resubmitted all of the evidence adduced at the guilt phase that was relevant to Shuler's murder. The government and petitioner stipulated to several mitigating circumstances: that petitioner had no prior felony or drug convictions; that state murder charges against Jarrell and Jarrell's son had been dismissed; and that neither would be prosecuted by federal or state authorities in connection with Shuler's murder. After receiving its instructions, the jury unanimously found as aggravating circumstances that petitioner intentionally had caused Shuler's murder and that petitioner procured the murder by promising the payment of money. The jury unanimously recommended that the death sen-

tence be imposed. The district court accepted the jury's recommendation and imposed a sentence of death. See Pet. App. A6-A7.

3. The court of appeals affirmed petitioner's capital murder conviction and death sentence. Pet. App. A1-A55.[1]

ARGUMENT

Petitioner presents six different questions challenging the court of appeals' affirmance of petitioner's convictions and sentence of death. Because the Court's decision in *Simmons* v. *South Carolina*, No. 92-9059 (argued Jan. 18, 1994), might affect the proper analysis of the first question, the petition should be held for this Court's decision in *Simmons*. None of the other contentions raised by the petition warrants review by this Court.

1. Petitioner first contends (Pet. 7-12) that the district court erred in failing to advise the jury of the sentence that petitioner would face if the jury did not recommend a sentence of death.

a. In the district court, petitioner initially asked that the jury be instructed:

> If you do not recommend the death penalty, the Court will impose a sentence of life imprisonment without possibility of release or some other sentence authorized by law. It is your responsibility to decide whether [petitioner] is to be put to death. If you decide that he is not, any other sentencing responsibility belongs to the Court.

2 R. Item 220 (Requested Instruction No. A-12).[2] Similarly, at the charging conference, the parties discussed a draft set of instructions that provided as follows:

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[1] The court affirmed in all other respects as well, except that it accepted the government's concession that the conspiracy conviction should be vacated because it was a lesser included offense of the continuing criminal enterprise conviction. Pet. App. A51.

[2] We cite the record on appeal as "R.," with an arabic number preceding the citation to indicate the volume of the record in which the cited document appears.

> Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the court's instruction of law whether to recommend a sentence of death rather than a sentence of life imprisonment without possibility of release or some other lesser sentence to be determined by the court.

2 R. Item 221, Court Exh. 6, at 10.

Petitioner's counsel objected to that proposed instruction, explaining: "I don't think they [*i.e.*, the jurors] make a recommendation of a sentence if they don't recommend death." The court agreed, explaining: "They don't. I just picked up—I actually there had turned to the statute and that is what the statute says, that they are to recommend."[3] When petitioner's counsel responded "That's right," the court stated: "I'm quite willing to drop that. I see how that could be confusing to them." Petitioner's counsel again responded, "That's right," the court stated "That suits me," and petitioner's counsel closed the discussion by saying: "All right." Apr. 2, 1991, Tr. [14 R.] 40-41; see also *id.* at 57-58 (colloquy between court and petitioner's counsel reiterating that the language was deleted at the request of petitioner's counsel).

As a result of that discussion, the district court instructed the jury as follows:

> Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the court's instruction of law whether to recommend a sentence of death. If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.

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[3] The court apparently was referring to the penultimate sentence of 21 U.S.C. 848(k), which provides that the jury "shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence."

Apr. 3, 1991, Tr. [15 R.] 87; see *id.* at 85 ("[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended.").[4]

At the conclusion of the instructions, petitioner's counsel expressly objected to the district court's instructions that the jury was required to agree unanimously on the absence of an aggravating circumstance and on a recommendation against the death sentence (an objection discussed at pages 12-15, *infra*). After the district court noted and overruled that objection, petitioner's counsel asked for an opportunity to review the instructions he had requested to "see if there are any others" to which he wished to object. The district court stated: "As far as I'm concerned you have an exception to my failure to give each of your fifteen [proposed instructions] in the language that you suggested to me to give them." Apr. 3, 1991, Tr. [15 R.] 93-94.

b. On appeal, petitioner contended that the jury had the power to recommend the sentence to be imposed if the jury did not recommend a sentence of death or, in the alternative, that the district court at a minimum should have advised the jury of the sentence that petitioner would have faced if the jury had not recommended a sentence of death. The court of appeals first rejected the contention that the jury should have been authorized to determine the alternative non-capital sentence. Pet. App. A9-A12. The court noted that petitioner had invited the instruction advising the jury that the judge would determine the alternative sentence (*id.* at A10), and also concluded that the district court's instructions were correct in any event.

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[4] The portion of the instructions set forth in the last quotation in the text had appeared in the draft of the instructions discussed at the charging conference (2 R. Item 221, Court Exh. 6, at 8), and petitioner did not object to it at that time.

The court noted that Section 848(*l*) provides, in cases where the jury does not recommend death, that "the court shall impose a sentence, other than death, authorized by law." Similarly, Section 848(p) provides that "the court may impose a sentence of life imprisonment without the possibility of parole." Pet. App. A11.[5]

The court then rejected petitioner's alternative claim that the district court should have advised the jury of the sentence that petitioner would face if the jury did not recommend a sentence of death. Pet. App. A12-A14. The court reiterated that the responsibility for determining the sentence if the jury did not recommend death rested with the judge, and stated that "[n]othing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death." *Id.* at A14. Accordingly, the court of appeals concluded that the jury instructions were correct.

c. Although the relevant portion of the petition (Pet. 7-12) is ambiguous, it seems clear that petitioner no longer argues, as he did in the court of appeals, that the jury was entitled to recommend a specific non-capital sentence if it determined not to recommend a sentence of death. That portion of the petition may be read to raise three related claims, however, which we discuss separately.

i. The focus of the first question presented seems to be an objection to the district court's failure to instruct the sentencing jury that petitioner's "alternative sentence would be life without parole." Pet. 7. But petitioner never requested that instruction in the district court[6] and never

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[5] The court also rejected petitioner's related contention that its interpretation of the statute violated the Fifth and Eighth Amendments. Pet. App. A11-A12.

[6] Petitioner's requested instructions with respect to the penalty hearing appear at 2 R. Item 220. The relevant instruction (No. A-12), which we quote above, described a range of possible alternative sentences—"life imprisonment without possibility of release or some other sentence authorized by law"—and thus would not have indicated that

argued for that instruction in the court of appeals.[7] That claim, therefore, is not properly before the Court. See Fed. R. Crim. P. 30; *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). In any event, that instruction would have been an inaccurate statement of law, because an unqualified "life without parole" instruction would not have apprised the jury of the sentencing alternatives that actually were available to the judge in the event the jury did not recommend a capital sentence.[8]

ii. To the extent that petitioner suggests (Pet. 7, 9) that he was entitled to a jury charge using language that tracks the language of Section 848(k) indicating that jurors are charged with determining that a sentence of death is appropriate "rather than" some lesser sentence (see note 3, *supra*), petitioner has waived that claim, because, as explained above, he expressly requested the deletion of the language in question. See *United States* v. *Olano*, 113 S. Ct. 1770, 1777 (1993).[9] Federal courts tradi-

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petitioner would be subject to a specific sentence of life imprisonment without possibility of release.

[7] In the court of appeals, petitioner claimed that the jury should have been advised "of the *maximum* alternative sentence to death—a term of life imprisonment without parole," Pet. C.A. Br. 32 (emphasis added), or that the judge "should have either determined [petitioner's] sentence on the other counts prior to deliberations or informed the jury of the applicable sentencing range," *id.* at 32 n.9.

[8] Although petitioner correctly notes (Pet. 7 n.6) that Sentencing Guidelines § 2A1.1 provides for a base offense level that requires life without parole, 18 U.S.C. 3553(b) and Sentencing Guidelines § 5K2.0 authorize the court to depart downward from the Guidelines' range. In the case of petitioner's offense, the statute permits a minimum sentence of 20 years' imprisonment. 18 U.S.C. 848(e)(1)(A). Departures have occurred under that provision. See *United States* v. *Villarreal*, 963 F.2d 725, 727 (5th Cir.) (in trial under Section 848(e), jury recommended against death, and trial court departed downward to sentence one defendant to 40 years' imprisonment), cert. denied, 113 S. Ct. 353 (1992).

[9] Petitioner's general reservation of error at the end of the instructions (Apr. 3, 1991, Tr. [15 R.] 93-94) did not preserve that claim, because petitioner's proposed instructions (2 R. Item 220) did not include such an instruction.

tionally have been reluctant to permit attorneys to request or agree to a particular procedure and then challenge the procedure as error on appeal. To recognize such claims would provide an incentive to a defendant to inject error into the trial in the hope of creating grounds for reversal in the event of conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). As a result, defendants like petitioner who request the deletion of language from an instruction, even more than defendants who merely fail to object to an instruction, have no right to claim on appeal that the district court erred in omitting the challenged language. See *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989).

iii. Finally, petitioner appears to renew (Pet. 8 n.7) his argument that the court should have given his requested instruction that the judge would "impose a sentence of life imprisonment without possibility of release or some other sentence authorized by law." Because the merits of that argument may be affected by this Court's decision in *Simmons*, the case should be held pending that decision.

In *Simmons*, a defendant who received a capital sentence argues (Pet. Br. 13-38) that the Due Process Clause and the Eighth Amendment required the trial court to give the jury an accurate instruction that the only available sentence if he were not sentenced to death was life imprisonment without the possibility of parole. Even if this Court were to accept that claim, the Court's analysis would not necessarily require the conclusion that the Constitution compels that any particular instruction regarding non-capital sentencing alternatives be given in a proceeding under Section 848(e). The federal sentencing scheme, unlike the state sentencing scheme at issue in *Simmons*, does not require a specific sentence of life imprisonment without the possibility of parole as the only alternative to a death sentence. Rather, it permits the court to impose a sentence of imprisonment ranging from 20 years to life. See note 8, *supra*. Accordingly, an

instruction that accurately informed the jury of the judge's full range of sentencing options under Section 848(e) in fact could prejudice the defendant by suggesting to the jury that a sentence of death would be the only certain means to incapacitate the defendant permanently. Here, for example, petitioner was eligible for a sentence as low as 20 years' imprisonment if the jury did not recommend death.[10]

Moreover, the fact that Simmons would have been sentenced to life imprisonment without the possibility of parole was crucial to the defendant's theory of mitigation in that case, which was that any propensity Simmons had for violence could be controlled by incarceration (which would be permanent). Here, by contrast, petitioner's principal argument against the death penalty was a quite different one, that the circumstances of the crime and of his character indicated that death would be an excessive penalty. Apr. 3, 1991, Tr. [15 R.] 58-63. Hence, the likelihood of incarceration for life without the possibility of release was not nearly so relevant in this case as it was in *Simmons*.

In sum, because the federal sentencing system differs from the system at issue in *Simmons*, and because petitioner's defense at the sentencing hearing did not raise the issues presented by the sentencing hearing under review in *Simmons*, the Court's decision in that case, even if it upheld the defendant's claims, would not necessarily support petitioner's constitutional arguments here.

Nevertheless, the Court's resolution of the question presented in *Simmons* may lend support to petitioner's claim that the Constitution required instructions to his jury regarding the possible alternative sentences. And the

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[10] An instruction that informed the jury of that prospect could undercut the main purpose that petitioner contends would be achieved by giving an alternative-sentence instruction: overcoming the jurors' "fear [of] the early release of capital offenders," which, petitioner argues, "is a powerful factor weighing in favor of recommendations of death." Pet. 9.

constitutional principles explained in *Simmons* also may have a bearing on petitioner's statutory claims. Although no provision in Section 848 specifically directs the judge to advise the sentencing jury of the range of alternative sentences that would be available if the jury recommends against death,[11] the language of the statute does indicate that the jury must recommend "that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence," 21 U.S.C. 848(k).[12] Accordingly, if the decision in *Simmons* creates significant doubts about whether Section 848 would be constitutional if it did not require an instruction advising the jurors of the alternative sentences available, it could be appropriate to construe Section 848(k) in a fashion that avoids those constitutional concerns.[13] Cf., *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

In our view, the appropriate course for the Court in the event *Simmons* lends support to petitioner's claim would be to vacate the judgment of the court of appeals and remand the case to that court. Because the court of

[11] Other provisions of Section 848 include explicit requirements for jury instructions on particular issues. See Section 848(k) ("The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed."). The absence of such a requirement here undermines petitioner's statutory claim considerably.

[12] As explained above, petitioner had the trial judge delete from the instructions language that closely resembles that phrase of the statute. Apr. 2, 1991, Tr. [14 R.] 40-41 (colloquy regarding instructions); see 2 R. Item 221, Court Exh. 6, at 10 (text of court's proposed instruction).

[13] The legislative history recounted by petitioner, see Pet. 9-11, suggests that the Congress intended for the jury to make an affirmative choice to recommend death (rather than some other sentence). Although that history standing alone would not require the giving of an instruction that the plain language of the statute does not require, it could support a construction of the statute that would relieve Section 848(k) of constitutional difficulties.

appeals rejected petitioner's claim on the merits, it did not address the government's argument (Gov't C.A. Br. 25-27 & n.16), which we have summarized above, that petitioner failed to preserve his claim that the jury should have been advised of the non-capital sentencing options. Furthermore, given the significant differences between the federal statute and the state statute at issue in *Simmons*, it would be appropriate to allow the court of appeals to consider the applicability of *Simmons* to Section 848(e) in the first instance. Accordingly, it is appropriate for the Court to hold the petition in this case pending the decision in *Simmons*.

2. Petitioner next contends (Pet. 13-15) that the sentence of death should be overturned because the instructions did not adequately explain to the jury that petitioner would receive a non-capital sentence if the jury failed to reach a unanimous verdict on the penalty issue.

a. Under Section 848(k), a jury's recommendation in favor of a death sentence must be "by unanimous vote." If the jury does not unanimously recommend that a sentence of death be imposed, the trial court is directed to "impose a sentence, other than death, authorized by law." Section 848(*l*). In submitting this case to the jury at the penalty phase, the district court instructed the jury that, with respect to each of the alleged aggravating factors, the jury should "unanimously find" that the government "has" or "has not" established the factor beyond a reasonable doubt. Apr. 3, 1991, Tr. [15 R.] 88-90.[14] Similarly, with respect to

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[14] The verdict forms made it clear that the jurors did not have to reach unanimous agreement on mitigating factors:

> We also understand that a finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of his or her weighing of the aggravating factors and mitigating factors regardless of the number of jurors who concur that the factor has been established.

its ultimate recommendation regarding punishment, the court instructed that the jury should "unanimously recommend" that "a sentence of death be imposed" or that "a sentence of death not be imposed." *Id.* at 90-91 (emphasis omitted). The court further explained "that a jury is never required to impose a death sentence and that a recommendation that a sentence of death be imposed cannot be made except by a unanimous vote." *Id.* at 91. Earlier, the court had explained that if the jury did "not make such a recommendation, the court is required by law to impose a sentence other than death." *Id.* at 87.

b. The court of appeals rejected petitioner's claim that those instructions constituted reversible error. Pet. App. A18-A21. The court of appeals held that the district court was "not required to instruct the jury on the consequence of the jury's inability to reach a unanimous verdict." *Id.* at A20. The court relied on "the general interest the criminal justice system has in unanimous verdicts," and explained that "[a]sking the jury to return a unanimous verdict forces jurors to examine their views on the case and engage in discussions and deliberations as they attempt to resolve their differences." *Ibid.*

c. At bottom, petitioner challenges the trial court's unwillingness to give the jury a specific instruction describing the consequences that would follow if the jury did not reach unanimous agreement on the propriety of a sentence of death. The trial court's refusal to give such an instruction does not justify overturning petitioner's sentence.

Our criminal justice system has a significant interest in encouraging juries to reach unanimous conclusions in all cases where that can be done consistently with the sincerely held views of the individual jurors. The interest in jury unanimity is particularly important when the question is whether a defendant should receive a sentence

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Apr. 3, 1991, Tr. [15 R.] 90-91. Petitioner's objection to that instruction is discussed at pages 15-20, *infra*.

of death, because the government has a "strong interest in having the jury express the conscience of the community on the ultimate question of life or death." *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 (1988) (internal quotation marks omitted). Hence, the Court has rejected an attack, in the capital context, on an *Allen* charge urging jurors to attempt to reach a consensus. *Id.* at 238-239. The instructions and the verdict form used in this case furthered the interest in jury unanimity by encouraging the jury to reach unanimous agreement on the questions submitted to it.

Contrary to petitioner's argument (Pet. 13, 15), the instructions did not misinform the jury about the consequences that would follow upon the jury's inability to reach unanimous agreement. None of the instructions indicated that there was any possibility of petitioner receiving a death sentence if the jury did not reach unanimous agreement. Furthermore, several of the instructions affirmatively suggested that petitioner would not be sentenced to death if the jury failed to agree. See, *e.g.*, Apr. 3, 1991, Tr. [15 R.] 87 ("If you do not make such a recommendation [*i.e.*, a unanimous recommendation of a sentence of death], the court is required by law to impose a sentence other than death."). What the instructions did not do is specifically advise the jury of the effect of Section 848(*l*), which provides that if the jury does not agree unanimously, the court does not attempt to secure a unanimous verdict from a second jury, but instead proceeds directly to impose a non-capital sentence. Because the effect of the instruction petitioner seeks is to undermine the jury's sense of its obligation to reach unanimous agreement if it is able to do so, it is not error for the court to refuse to give the instruction.

Petitioner's claim that the courts are in conflict on the question (Pet. 14-15) is unfounded. First, there is no conflict in cases interpreting the statute at issue in this case for the simple reason that this is the only appellate decision interpreting that statute. Moreover, although

petitioner discusses (Pet. 14) the procedures that have been followed by district courts conducting sentencing hearings in some of the other capital cases that have been tried under Section 848(e), he does not cite any opinion of the courts in those cases holding that the statute or the Constitution required the court to give the instruction he requests here. Similarly, none of the habeas corpus cases on which petitioner relies (Pet. 15 n.16) involved instructions that accurately advised the jury that its decisions with respect to aggravating factors required unanimity and that those with respect to mitigating factors did not.[15] In sum, petitioner fails to establish that the court of appeals' resolution of a question of first impression creates a conflict warranting attention by this Court.

3. Petitioner next contends (Pet. 16-23) that the district court committed plain error in failing to require the jury to return written findings regarding the existence of mitigating factors.

a. The court of appeals addressed and rejected that claim. Pet. App. A14-A18. The court explained that "[a]t no time * * * did [petitioner] request that the jury be instructed to return written findings of mitigating factors or object to the lack of such an instruction," and thus concluded that petitioner's counsel in the district court "did not adequately bring [that claim] to the district court's attention." *Id.* at A14-A15. Accordingly, the court reviewed the claim for plain error under Fed. R. Crim. P. 52(b). Pet. App. A15.

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[15] In *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir.), cert. denied, 493 U.S. 874 (1989), the court overturned a death sentence where it concluded that the instructions did not clearly indicate that unanimity was required for a sentence of death and suggested that unanimity was required for findings of mitigating factors. 867 F.2d at 373. As summarized above, the instructions in this case stated that "a recommendation that a sentence of death be imposed cannot be made except by a unanimous vote," Apr. 3, 1991, Tr. [15 R.] 91, and also indicated that there was no unanimity requirement with respect to mitigating factors, see note 14, *supra*.

Applying the analysis set forth in *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1778 (1993), the court started by determining whether an error was committed. The court noted that Section 848(k) expressly requires the jury to return findings regarding aggravating factors, but includes no such requirement for mitigating factors. Pet. App. A15-A16. The court nevertheless concluded that "Section 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings." *Id.* at A16. Because the district court did not give such an instruction in this case, the court of appeals concluded that the district court committed error. *Id.* at A16-A17.

The court nevertheless held that it was not appropriate to vacate petitioner's sentence of death, because it concluded that the error did not affect petitioner's substantial rights. Pet. App. A17-A18. The court explained that the parties "stipulated that [petitioner] had no prior conviction on any felony or drug charge and that Jarrell would not receive the death penalty,"[16] and the instructions actually given properly informed the jurors "how to find mitigating factors and the role of mitigating factors in their decision making process." *Id.* at A17. Relying on the presumption that jurors "follow the instructions they are given," the court concluded that the "error did not affect the outcome of the sentencing hearing." *Id.* at A17-A18.

b. We continue to believe that the trial court properly interpreted Section 848(k) not to require the jury to return written findings regarding mitigating factors. In any event, even if the trial court's failure to require such findings was incorrect, the court of appeals properly

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[16] Both of those circumstances were related to statutory mitigating factors. See Section 848(m)(6) (capital defendant "did not have a significant prior criminal record") and (8) ("[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death").

concluded that the error did not affect petitioner's substantial rights.

i. Subsection (k) of Section 848—headed "Return of findings"—is the provision of the statute that directly addresses the findings to be made by the jury in a capital prosecution under Section 848(e). The second sentence of that provision deals with findings regarding statutory aggravating factors: the jury "shall return special findings identifying any [statutory] aggravating factors * * * found to exist." The third sentence deals with non-statutory aggravating factors, and provides that if the requisite statutory aggravating factors are found, "a special finding identifying any other aggravating factor * * * may be returned." Section 848(k). The fourth sentence deals with findings of mitigating factors, as follows:

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established.

Those provisions offer two strong textual indicators that a jury at a hearing under Section 848(k) is not required to return findings regarding mitigating factors. First, the second and third sentences, which deal with aggravating factors, expressly refer to the jury's "return" of findings. The absence of similar language in the fourth sentence, which deals with mitigating factors, suggests that the jury need not "return" the findings discussed in that sentence. Similarly, the second and third sentences refer to "special" findings, language evocative of jury findings returned separately from a general verdict. See Fed. R. Crim. P. 31(e) (referring to a "special verdict" on certain issues in criminal forfeiture cases); Fed. R. Civ. P. 49 (regulating general verdicts and special verdicts in civil cases). The absence of a similar reference in the sentence

governing mitigating factors supports an interpretation of the statute that does not require the jury to return separate findings regarding mitigating circumstances.

That reading of the statute fully comports with the Constitution and, in fact, reflects congressional efforts to take care to avoid constitutional difficulties that had arisen under similar state statutes. An earlier version of the bill that became Section 848 provided in the provision analogous to Section 848(k) that the jury should "return special findings identifying any mitigating factors, and any aggravating factors * * * found to exist," and required that those findings "be made by unanimous vote." 134 Cong. Rec. 11,044 (1988) (subsection (k) of Amendment No. 2070, to S. 2355, 100th Cong., 2d Sess. (1988)).[17] Two days after this Court held in *Mills* v. *Maryland*, 486 U.S. 367 (1988), that the Eighth and Fourteenth Amendments barred States from requiring mitigating factors in capital sentencing hearings to be found unanimously, Senator D'Amato, the floor manager and principal sponsor of the proposed bill, called for an amendment of that provision to bring it into compliance with the Court's decision in *Mills*, to which he referred by name. 134 Cong. Rec. 13,748 (1988). The following day the Senate agreed to an amendment that produced the language in the current version of Section 848(k) by deleting the language requiring that the jury return special findings identifying mitigating factors, and adding in its place the provision that each juror individually may find and consider a mitigating factor without any requirement of jury unanimity. 134 Cong. Rec. 14,103-14,104 (1988) (Amendment No. 2343, to S. 2455, 100th Cong., 2d Sess. (1988)). That history, together with the decision in *Mills* to which it responds, strongly supports the interpretation articulated above.

[17] That amendment subsequently was withdrawn from S. 2355 and submitted by Senator D'Amato as the freestanding bill (S. 2455, 100th Cong., 2d Sess. (1988)) that ultimately became Section 848. See 134 Cong. Rec. 12,862-12,863 (1988).

ii. Petitioner's contrary interpretation of the statute rests almost entirely (see, *e.g.*, Pet. 16) on the provisions governing appellate review in Section 848(q). Those provisions indicate that the court of appeals "shall affirm" a death sentence if it determines that "the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section." Section 848(q)(3)(B). Because that provision deals only indirectly with the jury's obligations, it offers a slender reed for an interpretation that ignores the strong textual indicators offered by Section 848(k), the provision that deals directly with the jury's obligations.[18]

Moreover, because the appellate review provision makes perfect sense without interpreting it to override the clear indications of the text of Section 848(k), there is no reason to force a strained construction of Section 848(k). As the court of appeals explained (Pet. App. A16), Section 848(q)(3) does not by its terms "mandate the written findings of mitigating factors," but "require[s] only that [appellate courts] review any findings which are returned to ensure that the information presented during sentencing supports those findings." Finally, our view of the statute does not render superfluous the reference in Section 848(q) to mitigating factors, because even if jurors are not required to return findings regarding mitigating factors, it seems likely that a district court sitting as the sentencer would make such findings. In those cases, Section 848(q) would require the court of appeals to review those findings in the course of its review of the sentence of death.

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[18] The portion of Section 848(q) on which petitioner relies appeared in substantially identical form in the predecessor bill, which expressly required the jury to return findings regarding mitigating factors (134 Cong. Rec. 11,045 (1988) (subsection (q)(3)(B) of Amendment No. 2070, to S. 2355, 100th Cong., 2d Sess. (1988))), but was not amended when Congress removed the express obligation to return mitigating factors.

iii. Whatever the correct interpretation of Section 848's provisions regarding findings of mitigating factors, this case does not provide a suitable occasion for consideration of that question. Because petitioner did not raise this objection with the district court,[19] the question would directly affect his sentence only if the error satisfied the exacting plain-error standard established by Fed. R. Crim. P. 52(b).[20] Furthermore, as the court of appeals explained (Pet. App. A17), it is particularly unlikely that the lack of special findings on mitigating factors had any impact on the court of appeals' ability to review the propriety of the death sentence in this case. Given the lack of serious dispute about the factual basis for the mitigating factors to which the parties stipulated, there is no substantial reason to believe that the basis for the death sentence was the jury's failure to find appropriate mitigating factors; it is much more likely that the jury's decision reflected a reasoned moral response to the circumstances of a defendant who offered to pay for the murder of an individual in retaliation for the individual's cooperation with law enforcement authorities.

4. Petitioner next claims (Pet. 24-26) that Section 848 does not adequately narrow the class of offenders eligible for the death penalty because the necessary aggravating factor listed in Section 848(n)(1)(c)—that the defendant "intentionally engaged in conduct intending that the

[19] We disagree with petitioner's suggestion (Pet. 22 & n.22) that he adequately preserved the question in the trial court. Nothing in petitioner's explanation responds to the court of appeals' point that petitioner never asked that the jury be instructed to return written findings of mitigating factors, and never objected to the lack of such an instruction.

[20] Petitioner contends (Pet. 21-23) that the standard established by Fed. R. Crim. P. 52(b) does not apply to capital proceedings under Section 848 because of the review provisions set forth in Section 848(q). Those provisions do not, however, differ in any relevant way from the general provisions for criminal appeals set forth in 18 U.S.C. 3742(f), as to which Fed. R. Crim. P. 52(b) indisputably applies.

victim be killed"—duplicated an essential element of the offense of intentional murder under Section 848(e).

a. The court of appeals rejected that argument (Pet. App. A26-A28), explaining that this Court's decision in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), indicated that a death penalty statute is constitutional if it "narrows the class of death eligible defendants at the guilt phase and at sentencing allows for the consideration of mitigating circumstances and the exercise of discretion." Pet. App. A27 n.4. Because Section 848 satisfies that test, the court of appeals concluded that it is constitutional. Pet. App. A27-A28.

b. This Court's decision in *Lowenfield* answers petitioner's claim. In *Lowenfield*, the Court stated that the "narrowing function required for a regime of capital punishment may be provided [by a statute that] * * * narrow[s] the definition of capital offenses, as Texas and Louisiana have done." 484 U.S. at 246. Because the Louisiana statute at issue in *Lowenfield*—like the federal statute—limits the class of death-eligible defendants only by requiring the State to establish intentional murder, together with another aggravating circumstance (such as procuring commission of the murder by the payment of money), *Lowenfield* makes it clear that the federal statute adequately narrows the class of death-eligible defendants. Compare *id.* at 242 (referring to Louisiana statute that authorizes death penalty on proof of intentional murder if the defendant "has offered * * * anything of value for the killing"), with Section 848(n)(1)(C) and (6) (death penalty authorized if defendant "intentionally engaged in conduct intending that the victim be killed" and "procured the commission of the offense by * * * promise of payment").[21]

[21] Petitioner's suggestion (Pet. 24) that the conviction in this case somehow tests the lower limits of the Eighth Amendment's *mens rea* requirement is unfounded. The jury's finding that petitioner "intentionally engaged in conduct intending that the victim be killed," Section 848(n)(1)(C), reflects a mental state considerably more culpable

Petitioner's reliance (Pet. 25-26) on *Stringer* v. *Black*, 112 S. Ct. 1130 (1992), is misplaced. *Stringer*, like its predecessors *Godfrey* v. *Georgia*, 446 U.S. 420 (1980); *Maynard* v. *Cartwright*, 486 U.S. 356 (1988); and *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), involved the question whether a statutory aggravating factor was so vague as to invite arbitrary application of the death penalty in violation of the Eighth Amendment. Petitioner cannot plausibly claim that the aggravating factors at issue in this case run afoul of *Godfrey* and its progeny. Rather, this case involves the distinct question whether the aggravating factors that the statute articulates adequately narrow the class of death-eligible defendants. As explained above, *Lowenfield* answers that question in the affirmative.[22]

5. Petitioner next contends (Pet. 26-30) that his murder conviction should be overturned because the indictment and the jury instructions did not adequately allege a connection between the murder and petitioner's continuing criminal enterprise.

a. The court of appeals rejected that claim. Pet. App. A34-A37. The court concluded that the indictment was sufficient because it "track[ed] the language of the statute as written by Congress," and made "it clear that the government was charging [petitioner] with a murder in connection with, and not just contemporaneous to, the

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than the mental state found adequate in *Tison* v. *Arizona*, 481 U.S. 137, 152 (1987), "reckless indifference to the value of human life."

[22] Petitioner errs in asserting (Pet. 25) that *Stringer* renders *Lowenfield* "expressly inapplicable" to statutes that require jurors to weigh aggravating factors against mitigating factors. The Court in *Stringer* discussed *Lowenfield* only to make it clear that *Lowenfield*'s holding that the Court's "precedents do not require the use of aggravating factors" (because the State can implement narrowing at the guilt phase instead) does not affect the holding of *Godfrey*, under which the Court's decisions "have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content." *Stringer*, 112 S. Ct. at 1139.

ongoing continuing criminal enterprise." *Id.* at A36.[23] With respect to the jury instructions, the court noted that petitioner neither requested a jury instruction on that point nor objected to the instructions offered by the trial court, and accordingly reviewed the claim for plain error. The court concluded that the "clear and direct expression" of the jury instructions indicated "that there must be a connection between the murder and the continuing criminal enterprise." *Id.* at A37.

b. Because the government and petitioner agree that the court of appeals correctly held that the statute requires that the murder be connected to the continuing criminal enterprise, the only question is whether the indictment[24] and the instructions adequately set forth the meaning of the statute. For substantially the reasons set forth by the court of appeals, we believe that petitioner's criticisms are unfounded.

i. As this Court explained in *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself." Section 848(e)(1)(A) imposes criminal liability on "any person engaging in or working in furtherance of a continuing criminal enterprise, * * * who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." Count 3 of the indictment mirrored that language, modifying it slightly in a way that made it clear that the crime was committed in furtherance of the continuing criminal enterprise. See Pet. App. A35 (indictment alleged that petitioner, "while engaged in and working in furtherance of a continuing criminal enterprise, intentionally killed and counseled, commanded,

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[23] The superseding indictment on which petitioner was tried appears at 1 R. Item 115.

[24] Because petitioner did not challenge the indictment before trial on the basis he now raises (see 1 R. Items 180, 195 (petitioner's objections to the indictment)), his ability to challenge the indictment is circumscribed considerably by Fed. R. Crim. P. 12(b)(1).

induced, procured and caused the intentional killing of Martin Shuler"). Furthermore, to the extent that language left any doubt that the murder was committed "in furtherance of" the continuing criminal enterprise, the indictment as a whole, as the court of appeals explained (*id.* at A36), "makes it clear that the government was charging [petitioner] with a murder in connection with, and not just contemporaneous to, the ongoing continuing criminal enterprise." Petitioner's challenge to the indictment does not warrant review by this Court.

ii. Petitioner's objection to the jury instructions fails for similar reasons. First, because he failed to raise his objection in the trial court,[25] he can prevail only if the defect constituted plain error cognizable under Fed. R. Crim. P. 52(b). The instructions as a whole, however, advised the jury of the requirement that the murder be connected to the continuing criminal enterprise. The instructions on the murder count advised the jury that the murder charge was "built upon" the continuing criminal enterprise charge, and required a finding that petitioner procured the murder "while engaged in and working in furtherance of a Continuing Criminal Enterprise." Apr. 1, 1991, Tr. [13 R.] 186. Petitioner's disagreement with the court of appeals' understanding of the instructions that his trial counsel accepted does not warrant review by this Court.

6. Finally, petitioner contends (Pet. 30) that the district judge evidenced excessive bias when he stated in ruling on a pretrial motion that "Jarrell was an alcoholic lackey for [petitioner] who for $500, or maybe simply a fifth of liquor, likely would have done anything [petitioner] directed him to do." Order (Mar. 4, 1991), 1 R. Item 201, at 3.

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[25] Petitioner's requested instructions appear at 2 R. Item 217. His objections to the instructions given by the judge appear at Apr. 1, 1991, Tr. [13 R.] 61-64, 66-76, 84, 205-208. Petitioner does not contest the court of appeals' conclusion that he failed to raise that point in the district court.

a. The court of appeals rejected that argument, explaining that under applicable circuit precedent "a judge's rulings in a related case may not * * * serve as the basis for recusal," except "when the movant demonstrates pervasive bias and prejudice." Pet. App. A50. The court of appeals concluded that petitioner's criticisms of the district court "fail to demonstrate pervasive bias and prejudice." *Ibid.*

b. In light of this Court's recent decision in *Liteky* v. *United States*, 114 S. Ct. 1147 (1994), petitioner's claim is meritless. As the Court explained in *Liteky*,

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. at 1157. Petitioner does not suggest that the district judge's views of the relative culpability of petitioner and Jarrell were based on anything other than the record and proceedings in this case, and the comments he identifies do not establish the type of "deep-seated and unequivocal antagonism that would render fair judgment impossible," *id.* at 1158. Accordingly, the court of appeals correctly rejected petitioner's challenge to the district judge's denial of petitioner's motion for recusal.

CONCLUSION

With respect to the first question presented, the petition should be held for *Simmons* v. *South Carolina*, No. 92-9059 (argued Jan. 18, 1994), and disposed of in accordance with the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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